

## **REMARKS/ARGUMENTS**

Claims 1-32 are pending in the application. The Applicant hereby requests further examination and reconsideration of the application in view of these remarks.

### **Prior-art rejections**

In pages 2-6 of the Office Action, the Examiner rejected claims 1-5, 9-12, 16-20, 22-25, and 27-31 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,378,129 to Zetts in view of U.S. Pat. App. Pub. No. 2003/0061305 to Copley et al. The Applicant respectfully notes that page 2 of the Office Action incorrectly identified Zetts as U.S. Patent No. 6,389,129, which is actually a patent to Cowan. The Applicant presumes this was a typo and requests clarification if that is not the case. In pages 6-7, the Examiner rejected claims 6, 21, and 26 under 35 U.S.C. § 103(a) as being unpatentable over Zetts in view of Copley in further view of U.S. Pat. No. 5,956,716 to Kenner et al. and U.S. Pat. App. Pub. No. 2005/0060759 to Rowe et al. In page 8, the Examiner rejected claim 7 under 35 U.S.C. § 103(a) as being unpatentable over Zetts in view of Copley, Kenner, and Rowe, in further view of U.S. Pat. App. Pub. No. 2001/0025377 to Hinderks. The Applicant respectfully notes that the Office Action incorrectly identified the inventor of U.S. Pat. App. Pub. No. 2001/0025377 as “Hindricks.” The Applicant presumes this was a typo and requests clarification if that is not the case.

### **Allowable Subject Matter**

In pages 8-9, the Examiner stated that claims 8 and 13-15 are directed to allowable subject matter and would be allowable if rewritten in independent form.

### **Comments on Examiner’s Statement of Reasons for the Indication of Allowable Subject Matter**

In pages 8-9, the Examiner provided a “statement of reasons for the indication of allowable subject matter” (“the Statement”) which contains language that attempts to characterize the claimed subject matter and the cited references. The Applicant does not necessarily agree with the Examiner’s characterization of the teachings of the cited references. To that extent, the Applicant objects to the Statement. In addition, the Statement cites only a portion of the claim language from the allowable-subject-matter claims and their respective base and intervening claims. The Applicant submits that these claims recite additional language not cited by the Examiner. To that extent, the Applicant also objects to the Statement.

In general, to the extent that the Statement differs from the language of any of the allowable-subject-matter claims, the Applicant rejects any narrowing or limitations that might possibly result from such differences.

For each of these reasons individually and for all these reasons collectively, the Applicant objects to the Statement.

Claims 1, 18, 23, and 30

In rejecting claim 1, the Examiner argued that (1) it would have been obvious for one of ordinary skill in the art to combine the teachings of Zetts and Copley and (2) the proposed combination discloses all the recited features of claim 1. The Applicant submits that (1) the combination of Zetts and Copley is improper and (2) the proposed combination would not teach all the recited features of claim 1.

*Combination is Improper*

Zetts discloses providing video back-up for a primary streaming-video server by using a secondary streaming-video server synchronized with the primary server (*see, e.g.,* Zetts Abstract). Copley discloses a system and method for a user system, *i.e.,* a “client-side computer,” to have enhanced streaming media by automatically switching the user system to using a second source location for the content if problems develop in streaming the content to the user from a first location.

The Examiner asserted that it would have been obvious “to incorporate the teachings of Copley into the system of Zetts thereby creating a new playlist that is mirrored from a reference play list and further modify the system to include an offset attribute in the play list so that the clip can be resumed at a point in timeline at which the failure occurred, thereby providing seamless playback at the client.” The Applicant submits that that is not the case.

Fig. 1 of Zetts shows the various elements of its system, including primary video server 130 and secondary video server 150. Each of these two video servers is connected to video router 165 which is configured to switch inputs from the video servers to on-air output 198, which is the output of the Zetts system.

Fig. 3 of Copley shows the various elements of its system, such as client 105 and management server 110, which are connected via a network to cloud 196. Cloud 196 of Copley comprises host providers that “exist for providing content, as represented by provider server 1 and provider server 2” (Copley, paragraph 24).

If any elements of Zetts correspond to any elements of Copley, then they are the respective above-mentioned video and provider servers – *i.e.*, primary video server 130 of Zetts might correspond to provider server 1 of Copley and secondary video server 150 of Zetts might correspond to provider server 2 of Copley. Consequently, the only obvious combination of the teachings of Zetts and Copley would result in the entire system disclosed in Zetts being used in host-providers cloud 196 of Copley. Such a combination would not result in the modifications suggested by the Examiner, which would require the incorporation of alleged features from management server 110 of Copley into a combined Zetts/Copley host-providers cloud 196. Such suggested incorporation of features is implausible because the features belong to separate and distinct elements of the combined system. Therefore, the Applicant submits that the combination suggested by the Examiner is improper.

Furthermore, contrary to the Examiner's assertion quoted above, Copley would not teach modifying the playlist of Zetts to include an offset attribute. Copley explicitly teaches that the client "monitors playback status every second" (Copley, paragraph 83) and upon recognizing a failure in playback from a first source, the client makes a request for a new source and "attempts to load the clip referenced . . . , forwards to the point in the timeline at which the failure occurred, and resumes playback" (Copley, paragraph 84). Thus, Copley clearly teaches that its client is responsible for maintaining the information about the failure point and forwarding the clip referenced at the second location to that point. Consequently, it cannot be said that Copley provides any motivation to add an offset attribute to the playlist of Zetts. On the contrary, Copley's teachings make such an attribute wholly unnecessary and extraneous. Therefore, this further supports the submission that the Examiner's suggested combination of Zetts and Copley is improper.

The Examiner's assertions regarding the suggested combination improperly relied on hindsight and used the Applicant's recited claim as a template for piecing together disparate elements of actual and alleged prior art in an attempt to generate something similar to a claimed embodiment of the invention. See, e.g., *In re Fritch*, 972, F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992) ("[I]t is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious . . . . This court has previously stated that '[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the

claimed invention.”); *Texas Instruments Inc. v. U.S. Int’l Trade Comm’n*, 988 F.2d 1165, 1178, 26 USPQ2d 1018, 1029 (Fed. Cir. 1993) (“Absent . . . [a] suggestion to combine the references, respondents can do no more than piece the invention together using the patented invention as a template. Such hindsight reasoning is impermissible.”); *In re Gorman*, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991) (“As in all determinations under 35 U.S.C. section 103, the decisionmaker must bring judgment to bear. It is impermissible, however, simply to engage in a hindsight reconstruction of the claimed invention, using the applicant’s structure as a template and selecting elements from references to fill the gaps.”); *Symbol Technologies Inc. v. Opticon Inc.*, 17 USPQ2d 1737, 1746 (S.D.N.Y. 1990), *aff’d*, 935 F.2d 1569, 19 USPQ2d 1241 (Fed. Cir. 1991) (“That a technician, in hindsight, could combine elements known within the technology to produce the contested patent does not make the patent obvious to one skilled in the art at the time the patent was issued.”); *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988) (“The consistent criterion for determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have a reasonable likelihood of success, viewed in light of the prior art . . . Both the suggestion and the expectation of success must be founded in the prior art, not in the applicant’s disclosure.”).

*Cited References Do Not Disclose All the Recited Features*

In rejecting claim 1, the Examiner asserted that the proposed combination of Zetts and Copley discloses all of the claimed features of claim 1. The Examiner did not, and indeed, could not, even assert that either Zetts or Copley teaches a “playlist defining a plurality of attributes . . . the attributes comprising a . . . start-of message . . . .” Instead, as noted above, the Examiner asserted that the proposed combination of Zetts and Copley would make such an attribute obvious. However, as already explained above, the proposed combination, even if appropriate, which the Applicant does not admit, would not teach such a playlist having a start-of message attribute.

In addition, the Applicant submits that the term “playlist” used in Copley refers to a list materially different from both the playlist of Zetts and the playlist recited in claim 1. The playlist of Copley is a list of uniform resource locators (URLs) associated with media clips (Copley, paragraph 31). Not only is there no teaching in Copley for attributes such as broadcast time in a playlist, but such an attribute would make no sense in the system of Copley, where

content is streamed in response to a request from a user and not broadcast by a server at some predetermined time. The playlist of Zetts, on the other hand, includes a broadcast-time field (see, e.g., Fig. 2). Consequently, the Applicant submits that combining features of the playlist of Copley and the playlist of Zetts does not make sense and is improper.

In rejecting claim 1, the Examiner admitted that Zetts does not disclose the recited feature of “adjusting, based on the at least one identified active program segment, at least one of the on-air time, the start-of message, and the duration attributes for one or more program segments in the reference playlist to create the new playlist.” The Applicant respectfully submits that the Examiner mischaracterized the recited feature as “adjusting based on the identified active program, the one or more attributes in the reference play list to create a new playlist.” Significantly, claim 1 does not recite “adjusting based on the identified active program, the one or more attributes in the reference play list to create a new playlist.” Whether or not Zetts teaches this feature is not the issue. The issue is whether Zetts teaches the feature explicitly recited in claim 1.

The Examiner asserted that “Copley discloses the method creating a new play list in the event of a failure . . . wherein the new playlist references the media files at a back up server.” Assuming *arguendo* that Copley teaches what the Examiner asserted, which the Applicant does not admit, that does not amount to disclosing the recited feature, which requires adjusting “at least one of the on-air time, the start-of message, and the duration attributes.” References to media files at a back up server are not any of (1) on-air time, (2) start-of message, or (3) duration attributes. As a result, it cannot be said that Copley discloses this requisite feature of claim 1.

The Applicant submits, therefore, that claim 1 is allowable over the prior art. For similar reasons, the Applicant submits that claims 18, 23, and 30 are also allowable over the prior art. Since claims 2-17 and 31-32 depend variously from claim 1, claims 19-22 depend from claim 18, and claims 24-29 depend from claim 23, it is further submitted that those claims are also allowable over the prior art.

#### Claim 6

In rejecting claim 6, the Examiner argued that the suggested combination of Zetts with Copley, Kenner, and Rowe is proper and discloses all of the features of claim 6. The Applicant respectfully submits that the combination proposed by the Examiner would not teach the recited features of claim 6.

Assuming *arguendo* that the suggested combination is proper, which the Applicant does not admit, the suggested combination would not disclose all of the recited features. The Examiner asserted that Kenner discloses first and second subsystems respectively sourcing first and second geographical area. The Examiner further asserted the Rowe discloses multiple on-air feeds intended for different geographical areas, including different time zones. The Examiner then asserted that it would have been obvious to modify the art so that when a server in a second time zone fails, “a reference playlist being executed by a first subsystem that sources a first on air feed intended for viewing in at least first time zone can be used to establish an on air feed for a second time zone based on time of day.” Assuming *arguendo* that the modification would have been obvious, which the Applicant does not admit, the Examiner failed to even assert that the combination would teach that the “specified reference time is based on the current time of day in a second time zone that is different than the first time zone.” Consequently, it cannot be said that the cited references teach this requisite feature of claim 6

The Applicant submits, therefore, that this provides further grounds for the allowability of claim 6 over the cited references. Since claims 7 and 8 depend from claim 6, it submitted that this provides further grounds for their allowability over the cited references. For similar reasons, it is also submitted that this provides further grounds for the allowability of claims 21 and 26 over the cited references.

#### Claim 7

In rejecting claim 7, the Examiner asserted that (1) the combination of Zetts, Copley, Kenner, Rowe, and Hinderks is proper and (2) the suggested combination would disclose all of the recited features of claim 7. The Applicant submits that (1) the suggested combination is improper and (2) the suggested combination would not teach all the recited features of claim 7.

#### *Combination is Improper*

The Examiner asserted that Hinderks (this time styled as “Hidricks”) “is however evidence of a second on-air feed intended for viewing at a second time zone being a substantially time delayed version of the first on air feed,” and that “One of ordinary skill in the art would recognize that the first and second on feed sequence are substantially similar when the second is just a time delayed version of the first.” The Examiner further asserted that, “Accordingly, the play lists representing each would serve as an effective back up for the other. All the claimed

limitations were known in the art at the time of the invention and one of ordinary skill in the art could have combined them with known techniques yielding predictable results.”

The Applicant respectfully submits that the above is rather unclear as to what it asserts regarding the cited references and requests clarification. However, it clearly fails to provide any reason or motivation for one of ordinary skill in the art to combine the references other than the purely hypothetical assertion that one could have combined select alleged features of the references. The Applicant submits that such naked hypothetical conjecture is an improper grounds for combining references and that the Examiner’s proffered motivation to combine is an improper use of hindsight, as explained in detail above.

*Suggested Combination Would Not Teach All of the Recited Features*

Hinderks teaches a high-bandwidth transmission system and method having local insertion, delay play, and demand play (Hinderks Title). The Applicant submits that the Examiner failed to even assert that the suggested combination teaches the recited feature of “executing the new playlist on a second subsystem that sources a second on-air feed that is intended for viewing in at least the second time zone, wherein the second on-air feed is substantially a time-delayed version of the first on-air feed.” Instead, the Examiner made the assertions quoted above in an attempt to show that “the second on-air feed is substantially a time-delayed version of the first on-air feed.” Assuming *arguendo* that the suggested combination indeed teaches that “the second on-air feed is substantially a time-delayed version of the first on-air feed,” which the Applicant does not admit, there is not even an assertion, let alone evidence, that the suggested combination teaches the recited feature of “executing the new playlist on a second subsystem that sources a second on-air feed that is intended for viewing in at least the second time zone, wherein the second on-air feed is substantially a time-delayed version of the first on-air feed.” Consequently, it cannot be said that the cited references teach this requisite feature of claim 7.

The Applicant submits, therefore, that this provides further grounds for the allowability of claim 7 over the cited references.

Claim 11

In rejecting claim 11, the Examiner argued that the combination of Zetts and Copley discloses all of the features of claim 11, including that “the received reference playlist is selected from a plurality of playlists with the assistance of a rule-based playlist validator.” Specifically,

the Examiner cited the “ruleset resolver” of Copley as allegedly corresponding to the recited playlist validator. The “ruleset resolver” of Copley is mentioned as an element of Copley’s management server in paragraph 30. As described in paragraphs 40 and 41 of Copley, which were cited by the Examiner, the rulesets are used to select so-called mediaballs for inclusion in a playlist. The Examiner stated that “Copley ... discloses that depending on [particular rules,] certain elements ... that would be included in play list can vary,” thereby implicitly admitting that Copley’s rulesets are used to select elements for a playlist.

The selection of elements for inclusion in a playlist is not evidence of a playlist validator, as recited in claim 11. A playlist validator, in one implementation, determines whether archived playlists violate rules such as (1) is the duration of a program segment outside the established norms for the facility, (2) are two programs scheduled to play back-to-back from a linear device where the segments are non-contiguous, and (3) does the start time of any program segment violate a queuing or processing delay of a source device (*see*, Specification at page 11, lines 10-15). Copley teaches nothing of the sort. Consequently, it cannot be said that Copley discloses this requisite feature of claim 11.

The Applicant submits, therefore, that this provides further grounds for the allowability of claim 11 over the cited references. Since claim 12 depends from claim 11, it is further submitted that this also provides further grounds for the allowability of that claim over the cited references.

#### Claim 32

In the Office Action Summary, claim 32 was indicated as rejected, but no grounds for the rejection are provided in the Office Action itself. Claim 32 recites “adjusting, based on the at least one identified active program segment, the on-air time, the start-of message, and the duration attributes for the one or more program segments in the reference playlist to create the new playlist” (emphasis added). The Applicant submits that the cited references do not teach this requisite feature of claim 32. In addition, as noted above in reference to claim 1, the Applicant submits that the cited references do not even disclose having a start-of message in a playlist, let alone the adjustment of a start-of message to create a new playlist. Thus, it cannot be said that the cited references teach the recited features of claim 32.

Therefore, the Applicant submits that this provides further grounds for the allowability of claim 32 over the cited references.



In view of the above amendments and remarks, the Applicant believes that the now-pending claims are in condition for allowance. Therefore, the Applicant believes that the entire application is now in condition for allowance, and early and favorable action is respectfully solicited.

Fees

During the pendency of this application, the Commissioner for Patents is hereby authorized to charge payment of any filing fees for presentation of extra claims under 37 CFR 1.16 and any patent application processing fees under 37 CFR 1.17 or credit any overpayment to **Mendelsohn & Associates, P.C. Deposit Account No. 50-0782.**

The Commissioner for Patents is hereby authorized to treat any concurrent or future reply, requiring a petition for extension of time under 37 CFR § 1.136 for its timely submission, as incorporating a petition for extension of time for the appropriate length of time if not submitted with the reply.

Respectfully submitted,

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